75-1707

Supreme Court, U. S.
FILED
JUL 2 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

NO. .....

OHIO BUREAU OF EMPLOYMENT SERVICES, et al.,

Appellants,

v.

LEONARD PAUL HODORY,

Appellee

MOTION FOR LEAVE TO INTERVENE AND BRIEF IN SUPPORT OF THE MOTION

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Motion to Intervene

AND NOW comes the United States Steel Corporation by its attorney, Frank Manak, and moves this Court pursuant to Rules 24(a)(2) and 24(b)(2) of the Rules of Civil Procedure to intervene in the above-captioned action solely for purposes of participating in an appeal of the above action to the United States Supreme Court.

Respectfully submitted,

FRANK MANAK

Attorney for U. S. Steel Corporation

BRIEF IN SUPPORT OF MOTION TO INTERVENE

On March 4, 1976, a three judge court in the Northern District of Ohio found that the application of the Ohio labor dispute qualification provision, §4141.29 (d) (1) (a) of the Ohio Revised Code, was constitutionally invalid as to the appellee and the class members on equal protection and due process grounds. The Ohio Bureau of Employment Services, the appellant before this Court, was enjoined from continuing to enforce the provision against the appellee and the class members.

The appellant had filed a notice to appeal to this Court on March 26, 1976. On April 21, 1976, before the three judge court, U. S. Steel filed a motion to intervene in this case solely for the purpose of participating in the appeal taken by the Ohio Bureau of Employment Services. The three judge court dismissed this motion, holding that the filing of a notice of appeal divested the three judge court of jurisdiction in this case and refused to consider the merits of the motion to intervene filed by U. S. Steel. In order to expedite the final resolution of the issues in this case, the court found it appropriate to reach the merits, in case the court would ever be deemed to have jurisdiction to consider the motion. The court, in that event, would have denied the motion. See Appendix.

U. S. Steel is not here to appeal the District Court's dismissal of the prior motion, but rather, is here to file a new motion to intervene in this case for the purpose of participating in the above-captioned appeal before this Court. In support of this motion, U. S. Steel invokes the principles of Rules 24(a) (2) and 24(b) of the Federal Rules of Civil Procedure. These rules, of course, only

directly apply to the prescribed procedure in the district courts but it is submitted that the above portions of Rule 24 ought to apply by analogy on this motion to intervene for the purpose of participating in the appeal before this Court. It is the position of United States Steel Corporation that it is entitled to intervene in this action under the provisions of Rule 24(a)(2) of the Rules of Civil Procedure which permits intervention.

> (2) When the applicant claims interest to the property or transaction which is the subject of the action and he is so situated that the disposition of the action and may, as a practical matter, appear or impede his ability to protect that interest unless the applicant's interest is adequately represented by existing parties.

It is clear that United States Steel Corporation has a financial interest in the outcome of this litgation. As set forth in the affidavit of John Re under the Employment Compensation Law of Ohio, the amount of unemployment compensation tax paid by an employer depends on the amount of unemployment compensation benefits paid to his employees. See Appendix. Accordingly, each employer has a definite interest in insuring that his employees collect no more in unemployment compensation than that which they are entitled to receive. Obviously, United States Steel has a significant interest in the outcome of the instant case because of the great number of U. S. Steel employees who would receive the unemployment compensation benefits as a result of the Court's decision in this case.

It is also clear that the disposition of the instant action as a practical matter would not only impair the ability of U. S. Steel to protect this interest but would

actually demolish such ability. Ordinarily, an employer aggrieved by the act of the Bureau of Employment Services in awarding unemployment compensation to claimants may protest such action through the administrative processes established by the Ohio Unemployment Compensation Law and may then seek judicial review of the decision reached by such process. Although U. S. Steel could, of course, protest any action of the Bureau of Employment Services in paying unemployment compensation to the members of the class (in accordance with the order of the three judge court) such an appeal would, obviously, be fruitless because both the Ohio administrative authorities and the Ohio courts would be bound by this Court's decision regarding the constitutionality of the Ohio labor dispute qualification and, accordingly, would have no choice but to deny U. S. Steel's protest. Thus, U. S. Steel has no avenue to protect its interest than through intervention in the present case.

Appellee would argue that the interest of the Ohio Bureau of Unemployment Services are essentially the same as the interests of U. S. Steel in this case and that the interest of U. S. Steel would be adequately represented in this case by the Bureau. On U. S. Steel's prior motion to intervene, the District Court, without discussion, concluded that the interests of the Bureau were essentially the same as the interests of U. S. Steel. It taxes credulity to assume that these interests are essentially the same. It is the position of U. S. Steel that its interests are not adequately represented by the appellants in the instant case. The interests of the appellants in this case are to see that the laws of the State of Ohio are enforced in accordance with the intention of the

legislature and the governor. The appellants have no particular interest whether or not the plaintiffs get unemployment compensation or not. Indeed, since the labor dispute provision at issue in this case has been appealed, the appellants' major interest in this litigation involves the potential impact of the principles of this decision on the current labor dispute disqualification. On the other hand, U. S. Steel, as noted above, will certainly have a direct financial interest in the immediate consequences of this decision. Given the difference in interests between the defendants and U. S. Steel, the appellants cannot, by definition, adequately represent the interests of U. S. Steel. Indeed, the Supreme Court's decision in *Trbovich v. United Mine Workers,* 404 US 528, 538-9, (1972), has established the principle that a governmental agency cannot adequately represent the interests of a private party because a governmental agency has, at best, a dual function since it must also represent the public interest and enforce the law in accordance with the intent of Congress as well as champion the cause of the private party it allegedly represents. The Court noted that "both functions are important and they may not always dictate precisely the same approach that the conduct of litigation. Even if the Secretary is performing his duties broadly conceived the union member may have a valid complaint about the performance of his lawyers." (at 539). *Trbovich* then stands for the principle that the inadequacy principle should not bar intervention by a private party such as U. S. Steel in a suit where a governmental agency is allegedly representing the private party's interest let alone in a case such as this where the governmental agency is not charged with protecting the interests of U. S. Steel but, by coincidence, is on the same general side as U. S. Steel.

Also, it is clear that under the circumstances of this case, the instant motion to intervene is timely made. U. S. Steel, as set forth in the affidavit by John Re, had no knowledge of the existence of this litigation until the District Court's decision was reported in various newspaper accounts. Indeed, U. S. Steel did not even receive a copy of the U. S. District Court's decision, let alone the remaining pleadings, until March 18, 1976. Under these circumstances, it motion to intervene at this time solely for the sake of participating in an appeal is timely. As Professor Moore has noted, "intervention after judgment is unusual and not often granted. It may be allowed, where it is the only way to protect the intervenors, e.g. where the intervenor would be bound by the judgment and the party purporting to represent him fails to appeal." 3. B. Moore's Federal Practice, 24-5, 26-7. Accord, *American Brake Shoes & Foundry Company v. Interborough Rapid Transit Company,* 3 F.R.D. 162 (S.D.N.Y. 1942).

In the alternative, it is the position of U. S. Steel that Rule 24(b)(2) of the Federal Rules of Civil Procedure may be properly invoked here.

> "Upon timely application, anyone may be permitted to intervene in an action: . . . subsection 2 when applicant's claim or defense and the main action have a claim of law or fact in common. . . . In exercising its discretion, the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties."

It is difficult to see how the proposed intervention will unduly delay or prejudice the adjudication of the rights of the original parties. The litigation now involves

a purely appellate matter and U. S. Steel's intervention will not significantly prolong the proceeding, will not significantly increase the workload of the Court, will not affect the rights of the parties, and ought not hamper the proper presentation of their respective cases. Accordingly, this Court should grant U. S. Steel's motion to intervene solely for the purpose of participating in an appeal.

Respectfully submitted,

FRANK MANAK
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APPENDIX A

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

LEONARD PAUL HODORY,
Plaintiff

v.

OHIO BUREAU OF EMPLOYMENT SERVICES, et al.,
Defendants

No. C 75-15 Y

Affidavit

Commonwealth of Pennsylvania
County of Allegheny } ss.:

Before me, the undersigned public authority, personally appeared John Re who being duly sworn in accordance with law deposes and says:

1. I am John Re, Staff Assistant—Tax Division, United States Steel Corporation.

2. I have responsibility for the overall handling of unemployment compensation matters within the United States Steel Corporation.

3. In 1974, a large number of United States Steel Corporation employees at the Youngstown, Lorain and Cuyahoga Works facilities were laid off as a result of a coke shortage which in turn was caused by a strike by the United Mine Workers of America at the Corporation's mines.

4. Many of the employees so laid off applied for unemployment compensation under the Ohio Unemployment Compensation Law.

5. The Ohio Bureau of Employment Services denied claims for unemployment compensation by employees from Youngstown and Cuyahoga Works because of the labor dispute disqualification in the Ohio Unemployment Compensation Law but awarded unemployment compensation to many employees from Lorain Works.

6. The United States Steel Corporation has appealed the award of unemployment compensation to employees from Lorain Works.

7. The United States Steel Corporation is not a party to the above action and had no knowledge of its existence until newspaper accounts concerning this court's decision in this case were called to its attention.

8. The United States Steel Corporation did not receive a copy of the decision in this action until March 18, 1976.

9. Since under the unemployment compensation law an employer's tax rates reflects the number of benefits paid to his employees so that ultimately an employer pays one dollar in taxes for every dollar of benefits which his employees receive, the United States Steel Corporation has a definite financial interest in this action and any litigation involving claims for unemployment compensation.

10. Representatives of the defendant have advised me that their appeal of the instant action is motivated more by their concern about the prospective impact of the court's reasoning than their concern about the deci-

sion in the instant case and its impact on the United States Steel Corporation's experience rating under the Ohio Unemployment Compensation Law.

.....

JOHN RE (SEAL)

Sworn to and subscribed before me this 20th of April, 1976.

JANET A. POLHAMUS
Notary Public
Pittsburgh, Allegheny County
My Commission Expires September 4, 1978

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

LEONARD PAUL HODORY,
Plaintiff

v.

OHIO BUREAU OF EMPLOYMENT SERVICES, et al.,
Defendants

No. C 75-15 Y

Order

On April 21, 1976 United States Steel filed a motion in which it sought to intervene (presumably as a defendant) for purposes of participating in the appeal of this case, relying in support of its motion on Rule 24(a)(2), Federal Rules of Civil Procedure. United States Steel is the employer of the plaintiff class in this case and it contends that intervention of right must be allowed due to the financial consequences to it resulting from judgment entered in this case on March 5, 1976.

It appears that since a notice of appeal was entered in this case on March 26, 1976, this Court no longer has jurisdiction over these proceedings and that consideration cannot be given to the merits of the motion by United States Steel. *Rolle v. New York City Housing Authority,* 294 F.Supp. 574, 576 (S.D.N.Y. 1969). The prevailing rule is that the filing of a notice of appeal divests the trial court of jurisdiction over that case. *Elgen Manufacturing Corp. v. Ventfabrics, Inc.,* 314 F.2d

440, 444 (7th Cir. 1963) and *Weiss v. Hunna,* 312 F.2d 711, 713 (2nd Cir. 1963), *cert. denied* 374 U.S. 853 (1965), *reh. denied* 375 U.S. 874 (1963). Although none of the above cases involved decisions of three-judge courts, there is no reason to suppose the general rule would not be applicable to this type of proceeding. Accordingly, the motion must be dismissed since the Court lacks jurisdiction to consider it.

It is appropriate, however, to deal with the merits of the motion by United States Steel so as to expedite final resolution of the issues in this case, should this Court be deemed to have jurisdiction to consider the request for intervention.

Turning to the motion, it is noted that although intervention of right under Rule 24(a), F.R.C.P., is non-discretionary once the requirements established in that provision are met, the trial court must determine that the motion meets these requirements, including the fact that the motion is timely. *N.A.A.C.P. v. State of New York,* 413 U.S. 345, 365 (1973). In making an assessment of the timeliness of a motion to intervene, the trial court should consider, among other things, how far the proceedings have gone, what prejudice to the existing parties would arise from the allowance of the motion and what factors caused the delay in the filing of the motion *Nevilles v. E.E.O.C.,* 511 F.2d 303, 305 (8th Cir. (1975).

In this case, the Court finds the following matters relevant. The complaint was filed on January 27, 1975. Several pre-trial conferences were held and the matter was not presented until some nine months later and judgment was not entered until March 5, 1976. During these proceedings, numerous reports were made by the

mass media on the status of this case. At the time judgment was entered, a considerable amount of publicity accompanied the decision. Yet it was not until seven weeks after the entry of judgment that United States Steel filed its motion. Moreover, all relevant issues were fully treated by the parties and there was a totally adversary presentation of their views. The present defendants have a considerable interest in the outcome of the appeal and their interests are essentially the same as that of United States Steel.

Considering all of these factors, the Court finds that the matters raised are inadequate to support the rather exceptional relief requested by United States Steel, and accordingly its Motion to Intervene is denied.[2]

IT IS SO ORDERED.

.....

ANTHONY J. CELEBREZZE
Circuit Judge

.....

THOMAS D. LAMBROS
District Judge

.....

ROBERT B. KRUPANSKY
District Judge

Dated: .....

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2. As has been noted by the Court of Appeals for the Sixth Circuit in an analogous situation, participation as *amicus curiae* might be appropriate. See *Brewer v. Republic Steel Corporation,* 513 F.2d 1222 (6th Cir. 1975). This question is clearly one for the Supreme Court, however.